At a Term of County Court,
held in and for the County
of Oswego, at Oswego, New York,
on the 2nd day of March, 2016

PRESENT: HON. DANIEL R. KING
Acting County Court Justice

STATE OF NEW YORK
COUNTY COURT OSWEGO COUNTY

THE PEOPLE OF THE STATE OF NEW YORK	
against	ORDER
GARY THIBODEAU,	
Defendant.	

CPL §440.10 Decision
KING, J.:

DECISION AND ORDER

Defendant moved this Court on July 25, 2014 to vacate his judgement of conviction entered against him on August 7, 1995. Defendant argues that his conviction should be vacated based on the fact that newly discovered evidence which could not have been discovered during trial would have resulted in a favorable verdict for defendant (CPL §440.10[1][g]), and that because the People failed to provide Brady material, the People obtained defendant's conviction through fraud and

misrepresentation (CPL §440.10[1][b] and [h]).

Defendant specifically alleges that the People's failure to disclose material Brady evidence, including the full scope of information concerning Allen's status as a confidential informant and the fact that her information was publicly exposed, violated Brady to such an extent that defendant should be granted a new trial.

Further, the introduction of newly discovered evidence, that being statements about Ms. Allen's kidnapping made by three men, James Steen, Roger Breckenridge and Michael Bohrer, would result in a beneficial outcome and, therefore, defendant should be granted a new trial. Defendant also contends that statements made by Steen, Breckenridge and Bohrer constitutes evidence of third-party culpability which warrants a new trial.

Procedural History

Defendant was convicted after a jury trial in Oswego County of first-degree kidnapping in 1995. Thereafter, defendant appealed his conviction, as well as two orders that, following a hearing, denied his motion to vacate that judgment pursuant to CPL 440.10(1)(b), (c), (f), (g) and (h). The Appellate Division, Fourth Department, affirmed defendant's conviction (see People v. Thibodeau, 267 AD2d 952 [1999]), leave to appeal was denied (95

NY2d 805 [2000]) and denial of habeas corpus was affirmed by Thibodeau v. Portuondo, 486 F3d 61 [2nd Cir. 2007].

As a result of defendant's instant motion, a hearing was held during the months of January, February, March and April 2015.

At the end of testimony in April 2015, both parties requested an adjournment prior to the close of the hearing for the purpose of considering additional discoverable material and potential witnesses. On November 2, 2015, this Court issued a decision which denied additional witnesses testifying and evidence being presented at the hearing.

Both parties provided their final memorandums of law to this Court for consideration before the Court issued its decision on the ultimate issues presented at the hearing.

Confidential Informant: Brady

The Court will address the alleged Brady violation with respect to the confidential informant argument in three parts. Defendant argues that he was not aware that Ms. Allen was a confidential informant, and such evidence was Brady material which the People failed to turn over. Second, defendant alleges that even if Ms. Allen was not used as a confidential informant, the People withheld the fact that her pedigree information with

code name and fingerprints was dropped in the D&W parking lot in 1992 and those facts were Brady material. Lastly, defendant argues that the People committed a Brady violation by not disclosing the narrative reports by the officers involved in retrieving Ms. Allen's information from D&W or the index card which displayed her pedigree information.

Based upon the hearing record, both defendant's attorney, now Judge Fahey, and defendant's brother's attorney, now Judge Walsh, knew of Heidi Allen's contact with law enforcement about illegal drug activities prior to trial.

It should also be noted that the constant references by defendant that Ms. Allen was a confidential informant is misleading and inaccurate. Deputy Michael Anderson's report starkly contradicts defendant's allegation and clarifies Ms. Allen's status with law enforcement: "after the meeting was over, patrol expressed no interest in using Allen as an informant as she had no true information that could be useful to us. Allen was never formally signed up as a confidential informant and the case was never worked but left inactive." (Exhibit 10).

Moreover, Ms. Allen's information to law enforcement in 1991 pertained to friends of hers from high school who were using drugs, and none of her information implicated defendant,

defendant's brother, or Steen, Breckenridge or Bohrer.

Furthermore, when Ms. Allen disappeared in April of 1994, Deputy Christopher VanPatten who, along with Sgt. Roy Lortie, had interviewed Ms. Allen in 1991 about the possibility of being an informant, had no recollection of her being used as an informant until Sgt. Lortie reminded him that they met with her in 1991.

Judge Fahey knew of Ms. Allen's alleged CI status and had discussed it with Walsh in December of 1994 (HT p. 127 lines 7-13). Fahey stated that the undersheriff and the lieutenant of the Oswego County Sheriff's Department "contended that there was no file with respect to Heidi Allen being an informant and that whatever information she provided was not involving the Thibodeaus" (HT p. 127 lines 18-20).

During cross examination, Fahey was questioned about other discoverable documentation and his witness list:

> Q. Now, prior to coming here and prior to giving your affidavits, had you taken any steps to look through the file that you had in this case --
>
> A. No.
>
> Q. -- since the trial?
>
> A. I don't have the file so the answer is no.
>
> Q. So you've never gone through on your own to

> determine whether any of these documents that we're discussing here today are actually in the file, is that accurate?
>
> A. Yes, that's accurate.
>
> Q. We're solely here -- you're solely here based on your own memory, is that accurate?
>
> A. Yes. (HT p. 921 lines 5-18)

Also, Judge Fahey testified in good faith that he could not recall certain documents he received, for example the Lortie report, even though he had in fact received the document prior to trial and had previously marked it as defense Exhibit M in anticipation of using it at trial:

> Q. Now if you could turn to the bottom of page nine and page ten on Exhibit 5 which you have in front of you, is that the Roy Lortie report?
>
> A. Yes.
>
> Q. So you marked at trial an exhibit that has ten pages that on the bottom of page seven discusses the -- discusses what time Deputy Curtis showed up on the scene, and then at the bottom of page eight discusses the height and weight of Heidi Allen, and on page nine and ten has the Roy Lortie report. Isn't it quite possible that Exhibit M is the same exhibit that you hold in front of you?
>
> A. It is. (HT p. 924 lines 9-20)

Judge Walsh testified that there was a voluminous amount of investigative reports which he and Fahey maintained in their separate boxes of files. With respect to each counsel's

organization of that material, Walsh testified that Fahey had brought him to his attic before the trial and Walsh saw the condition in which Fahey kept his files:

> Q. Okay, and what was the condition of his file when you saw it that day?
>
> A. Well, it was -- I would say it was loosely organized but it was -- it was so big that he had it spread out all over his attic. I mean it was a very large room that it was in, and it was just -- there were papers everywhere. (HT p. 1602 lines 19-24)

Thus, based upon Fahey's understandable inability to recollect certain documents which he had in his possession twenty years ago, it cannot be held that the People committed a Brady violation based upon the fact that Fahey did not recall having received those documents prior to testifying at the hearing and in spite of his admittedly vague memory of the case.

Arguendo, even if this Court believes that defendant was not aware of Ms. Allen's interaction with law enforcement in 1991 or that her information had been dropped in the D&W parking lot in 1992, defendant was provided this material by the Sheriff's Department and the District Attorney's Office.

The three reports defendant claimed he never received were three narratives provided by deputies who were involved in the recovery of Ms. Allen's information from the D&W parking lot.

Those three reports were the statement of Deputy Michael Montgomery, (Exhibit 8), the statement of Deputy VanPatten (Exhibit 9) and the statement of Deputy Michael Anderson (Exhibit 10).

Former ADA Dodd testified on direct examination that, as a result of Fahey's argument in court on December 8, 1994, and the comments he made to the *Post Standard* at that time, Dodd met with Fahey on December 14, 1994 and turned over, in part, the three deputies' narratives as well as several boxes of discovery:

> From my direct recollection first, that on December fourteen, 1994, Attorney Fahey, Judge Fahey subsequently, came to the District Attorney's Office. I met with him in person at the District Attorney's Office. At that meeting was Investigator Terrence Whipple who was tasked and assigned to oversee the entirety of the Sheriff's Department investigation report. On that date for several hours, Attorney Fahey was allowed to inspect all of the Oswego County Sheriff's Department investigation report which was contained in a room within the District Attorney's Office, it was made up of documents, photographs, audio tapes. On that particular day, he was provided a copy of the Oswego County Sheriff's Department investigation report, a complete exact reproduction and copy of all of the material that was in the Oswego County Sheriff's Department investigation report on December fourteen, 1994. The exhibit that you handed me, sir, Exhibit 12, was the file memorandum that I prepared describing the procedure. (HT p. 1659 lines 8-25)

On cross examination, Dodd specifically addressed the

three narratives as being turned over on December 14, 1994:

> [Fahey] was provided. Ms. Bianco, again, on December fourteenth, 1994, the statement of Deputy Mike Montgomery, your Exhibit 8, he was provided. Your Exhibit No. 9, the statement of Deputy VanPatten, he was provided. I don't know if there's associated exhibit number. The statement of Michael Anderson, I believe it was received December nine, 1994. (HT p. 1813 lines 5-10)

Not only did Dodd testify to specifically turning over the three investigative reports, the People introduced Exhibit QQQ to support the fact that these three reports were, in fact, turned over in December 1994. Exhibit QQQ is a photocopy of VanPatten's report, date stamped December 9, 1994, that bears Dodd's handwritten notes: "MY COPY" "HA BRADY" "CC TOT BOTH D ATTN". Dodd testified what his handwritten notes reflected:

> Q. Showing you again Exhibit QQQ which is now admitted, you were asked some questions now and some of them are going to be a bit repetitive but you wrote some things on the top of that. What exactly did you write?
>
> A. In my hand, my copy, H-A.
>
> Q. Let me just stop you there. H-A stands for what?
>
> A. Heidi Allen.
>
> Q. Okay, continue. What else did you write?
>
> A. Brady, C-C, carbon copy, T-O-T, turned over to both defense attorneys.

Q. Now, you wrote T-O-T, that obviously is an anagram, not an anagram, initials I guess. If you had not turned it over, would there have been a different notation on there based on what you do with documents?

A. Well, it was turned over. I -- perhaps yes, but I -- this was again a work product so that I knew what it is that happened with these documents.

Q. Okay, and besides that, there's other writing on there?

A. Yes. On page one of received QQQ in my hand there's a highlighted in green ink and/or blue ink and/or pink ink certain portions of Deputy VanPatten's report which was received 12/9, 1994, page two, the same thing as to Deputy Michael Anderson in either pink, blue or green. I put it on these work copies, and as to the third portion of the exhibit, received in either blue or green ink from Michael Montgomery.

Q. And those were things that you -- you had noted that were important to you other than turning this over.

A. Yes.

Q. Okay? And when you -- when you wrote Brady, why did you write that on there?

A. Because potentially the content of the three documents contained information or evidence property that may tend to be exculpatory, Brady.

Q. Was there other material that you had noted in the course of -- of reviewing the documents in this case that you perceived to be potential Brady in nature that were turned over?

A. Yes.

Q. Now, that's -- you said that was received by

> your office on December ninth, the day after that, the discussion in court. Do you have any idea or any recollection whether or not that would have been in boxes that were turned over to Judge Fahey on December fourteenth?
>
> A. In fact, those documents were turned over personally by myself to Attorney Fahey on December fourteenth, 1994. They were contained within the Oswego County Sheriff's Department investigation report. (HT pp. 1668-1670)

Dodd also testified that before defendant's trial began on May 22, 1995, he sent a letter dated May 17, 1995 to both attorneys and copied the trial court on this correspondence (Exhibit 11A). This May 17, 1995 letter referenced the material which Dodd had recently received which was Inv. Nicholas Kleist's May 16, 1995 narrative, Ms. Allen's index card and Inv. VanPatten's notes that were retrieved from the D&W in 1992 (Exhibit 11A).

This Court has no reason to question that this information was not provided to both counsel and the trial court in light of the fact that Dodd's testimony underscores the May 23, 1995 date stamp attached to the May 17, 1995 letter and which was also located in the trial court's original file (See Exhibit 11A). Per defendant's request to have this Court review the trial court's original file, this Court reviewed the original May 17, 1995 letter which was date stamp received by Jefferson County

Court on May 23, 1995.

Despite the fact Bianco testified that she had not seen the three investigative reports until 2014, the Court credits Dodd's thorough testimony that he did, in fact, provide these three reports to Fahey in December 1994. Moreover, it would not make sense that the People would not turn over these reports shortly after they received them in light of the fact the three officers were instructed by Lt. Dean Goodsell to draft these narratives almost three years after the information was dropped. It does not make sense that Lt. Goodsell would instruct these officers to make written statements if the statements ultimately were not to be turned over.

The fact that the May 16, 1995 document, which was Inv. Kleist's report, was stamped received by the District Attorney's office on that same date, and the fact that Sheriff's Office date stamps that same report a week later on May 23, 1995, corroborates Inv. Whipple's testimony (HT pp. 1503-1504). Whipple testified that Inv. Herbert Yerdon and Kleist were tasked with trying to find the documentation on Ms. Allen and once they found it, they were directed to bring it immediately to the District Attorney's Office so that it could be turned over.

Further, despite the fact Bianco testified that she had

not seen the May 1995 letter and the attached index card and handwritten notes until 2014, it is clear, upon a review of the trial court's file, that the trial court received this same letter sent to defense counsel on May 23, 1995. It is contrary to logic to argue that the trial court received this letter on May 23, 1995 but that neither trial counsel received it without the attached documentation.

It is important to note that during Dodd's testimony, he referenced the People's ongoing duty to turn over discoverable materials. During cross examination, he was questioned about turning over Ms. Allen's information card again under a separate letter on June 5, 1995. After a review of the trial court's file, despite questions from defense counsel that the June 5, 1995 letter was not drafted on letterhead (Exhibit SS), intimating that said letter and referenced materials were never sent, the trial court's file contained that June 5th letter on letterhead.

Again, this letter underscores Dodd's testimony that Exhibit SS was on a draft yellow piece of paper and not on letterhead because he wanted to save money (HT p. 1690 lines 14-16). The fact that the letter (Exhibit SS) is not printed on letterhead shows that Dodd was truthful because his working copy

was, in fact, on a plain piece of paper.

It should be noted that the trial court's file has letters from Dodd on both letterhead and plain yellow pieces of paper, which lends to his testimony that, since so much correspondence was being sent in this case, he was trying to save money in not exhausting letterhead.

Ultimately, this Court cannot begin to speculate as to why appellate counsel Bianco only found a copy of the Kleist report in Richard Thibodeau's file and did not find the May 17, 1995 letter or Kleist's report in defendant's file. However, Bianco testified that she did not receive defendant's file until "sometime after the notice of appeal was filed" but that she couldn't be "certain" on that, given the fact that she and Fahey "were kind of sharing the boxes because he was still involved in the case at that point" (HT pp. 69-70 lines 24-25, 1-3). It is entirely possible that with the sharing of files and uncertainty of dates that the May 17, 1995 letter and the report were misplaced.

Finally, even if this Court were to take the position that neither counsel received the Montgomery Report dated December 8, 1994 and date stamped by the Oswego County Sheriff on December 9, 1994 (Exhibit 8), and the VanPatten Report (Exhibit

9) or the Anderson Report (Exhibit 10), both of which were date stamped by the Oswego County Sheriff on December 9, 1994, the fact that Ms. Allen's information was dropped in parking lot over two years prior to her disappearance is too remote and too speculative to have been allowed at trial.

Defendant parallels his argument and the People's conduct to the facts presented in People v. Wright, 86 NY2d 591 (1995). In Wright, supra, the Court of Appeals overturned a defendant's conviction after holding that the prosecution withheld Brady material concerning an assault victim's status as a police informant.

In Wright, after the male victim met the female defendant in a bar, they went to defendant's apartment. Despite conflicting stories about the reasons for going to defendant's apartment, defendant struck the victim with a knife that resulted in a lacerated penis. Defendant claimed she injured the victim in self defense because he tried to rape her. During part of the People's case, the People asserted that the male victim failed to seek medical treatment because he believed the police would not help him once they became aware of his criminal history. However, the People did not disclose that the male victim was an active confidential informant and that, to the contrary, the

victim worked closely with the police. The Court reasoned that if the jury had learned that the victim had a working relationship with the police, "his efforts to circumvent police discovery might have appeared even more suspicious" and overturned defendant's conviction (Wright, supra at 598).

However, the facts in defendant's case are more applicable to those presented in People v. Gamble, 72 AD3d 544 [1st Dept. 2010], affd. 18 NY3d 386 [2012]. In Gamble, the Appellate Division held that the trial court:

> properly exercised its discretion in precluding background information about one of the victims, offered by defendant to show that unknown persons may have had a motive to kill him. For the purpose of establishing, among other things, that defendant had a motive to kill the victims, the People had introduced evidence of a lengthy ongoing dispute between defendant and the victims, who lived in the apartment above his. Defendant sought to establish that one of the victims was a drug dealer, had offered to become a confidential informant, and had been beaten by unidentified persons approximately a year and a half before the homicide. The trial court properly concluded that this evidence was unduly speculative, and that its prejudicial effect outweighed its probative value (see People v. Primo, 96 NY2d 351 [2001]). Defendant acknowledges that this evidence did not point to the culpability of any particular "third-party," but argues that it was relevant to rebut that portion of the People's case that linked defendant to the crime by way of motive. Although the People's evidence of motive closely connected defendant, in particular, to the crime, it did not open the door to generalized, speculative evidence of possible motives by unidentifiable persons.

> Moreover, apart from defendant's testimony, there was no evidence suggesting that someone other than defendant was the killer (Gamble, supra at 545).

Defendant's argument that, if defendant had known of Ms. Allen's confidential informant status or that her information had been dropped in the D&W lot over two years prior to her disappearance that such information could have been used at trial, is without merit. It is certainly possible that Judge Fahey was well aware of the contents in Montgomery's, VanPatten's and Anderson's reports and consciously chose not to use them because the reports would have bolstered the testimony of McDonald and Baldasaro that defendant's kidnapping of Ms. Allen was drug-related.

Just as Bianco testified at the hearing that she knew Ms. Allen's status as a potential informant was important, yet Bianco chose to "disregard it" and not raise it as an argument on appeal, this Court cannot draw the conclusion that Fahey did not raise this confidential informant argument at trial because the People never provided the dropped information to him.

First, Fahey testified that he was aware Ms. Allen was not an informant, so any theory that someone other than defendant kidnapped her because she was a "rat", would have been too speculative to argue without any corroborating evidence.

Second, in light of the fact that Ms. Allen's information card had been, to use defendant's words, "publicized" more than two years prior to her disappearance, it is hard to imagine how defendant could have argued and admit into evidence that some unknown drug dealer had planned for two years to abduct and kill Ms. Allen in broad daylight with witnesses around.

Kristine Duell testified that after she found the information in the parking lot, she contacted law enforcement. Duell claims the only person she spoke to about this incident was her mother and that they decided they "would not make it known to anyone else" (HT p. 1878 lines 23-24). Duell's mother, Roberta Wills, testified that she did speak to her daughter but that Wills never spoke to anyone about what her daughter found. Thus, based upon the evidence at the hearing, there is no evidence that either Duell or Wills disclosed what information had been found in 1992 to others in the community.

Contrary to Fahey's testimony that had he known Ms. Allen's confidential information had been left in the parking lot of the D&W more than two years prior to her disappearance, he would have argued that there were others with a motive to harm her, in keeping with the holding in Gamble, supra, this Court holds that this evidence would be unduly speculative, and that

its prejudicial effect would've outweighed its probative value.

This Court finds that, as Ms. Allen was not a confidential informant for the Oswego County Sheriff's Office, there was no Brady material to turn over. However, even if the fact that Ms. Allen had provided limited information to law enforcement about drug activity in 1991, and the People treated that aspect as Brady material, that information, both the reports from Deputies Van Patten, Montgomery and Anderson and the card found at the D&W together with Inv. Kleist's report, were turned over to defendant on December 14, 1994 and in May 1995, respectively.

Finally, even if the Court believed that defendant never received any information about Ms. Allen's confidential informant status or the investigative reports, the information about her card being dropped in the D&W parking lot in January of 1992 is too remote, too speculative and prejudicial for a trial court to allow into evidence.

Upcraft's Statement: Brady

Defendant makes a tangential Brady argument that the People failed to disclose Darlene Upcraft's sighting of a white rusty van parked in front of the D&W the morning Ms. Allen was abducted. It is clear from the information Upcraft provided to

Investigator Dale Yager on April 7, 1994, that when Upcraft drove to church at 6:35 AM on Easter morning, she did not indicate that she saw a white rusty van in the D&W parking lot (Exhibit 19). Then, when Upcraft drove by the store on her way home from church around 7:31 AM, Upcraft didn't remember seeing anything to report (Exhibit 19 and HT p. 189 lines 23-25).

At that time, arguably, Ms. Allen was still in the store as her last transaction was at approximately 7:42 AM. Thus, defendant's argument that the People failed to the disclose the sighting of another van different than defendant's on the morning of Ms. Allen's disappearance is moot because at the time Upcraft testified that she saw the white rusty van on her way to church, Ms. Allen would have been inside the store for at least another hour.

Further, as defense counsel was provided with Officer Yager's report (Exhibit 19), defense could have independently followed up with Upcraft about what she reported to law enforcement.

Conclusion: Brady

Defendant received the documentation he requested after the People disclosed Ms. Allen's contact with law enforcement as a potential confidential informant before trial and he had a

reasonable opportunity to use it as part of his defense (compare People v. Sanchez, 21 NY3d 216, 225 [2013]). Despite defendant's arguments pertaining to certain documentation and not having received it before trial, this Court finds that the People did not commit a Brady violation.

Arguendo, even if defendant had moved to vacate his judgment of conviction under the argument that these reports and index cards constituted newly discovered evidence, defendant is not entitled to relief on this specific challenge. The hearing record demonstrates that this material was discoverable and, more importantly, that defendant did have it in his possession at the time of trial. "Therefore, the evidence does not satisfy the requirement that it was 'discovered since the entry of a judgment based upon a verdict of guilty after trial' (CPL 440.10 [1][g]; ... see also People v. Singleton, 1 AD3d 1020, 1021, lv. denied 1 NY3d 580)" (People v. Backus, 129 AD3d 1621, 1625 [4th Dept. 2015] [internal citations omitted).

As such, based upon the evidence presented at the hearing, this Court finds that the State did not obtain defendant's conviction through fraud and misrepresentations nor did it fail to disclose critical Brady material which would warrant this Court to vacate defendant's judgment of conviction

pursuant to CPL §§440.10(1)(b) and (h). Accordingly, defendant's motion is **DENIED.**

NEWLY DISCOVERED EVIDENCE

Defendant presented evidence which he argued supported his initial assertion that Steen, Breckenridge and Bohrer kidnapped Ms. Allen. However, throughout the hearing, there has been no evidence linking the three of them together prior to Ms. Allen's disappearance or on the morning thereof.

Then, defendant's theory turned to Steen kidnapping Ms. Allen, with another unidentified person in Steen's van, based upon an over twenty year old alleged identification of Steen by William Pierce. The Court will address Pierce's testimony further in this decision.

Finally, defendant focused the majority of his argument on placing Bohrer as the suspect most responsible for Ms. Allen's abduction based upon his absurd behavior after her disappearance, unsupported emotional attachment to the kidnapping investigation and criminal past.

"Pursuant to CPL 440.10(1)(g), a court may vacate a judgment of conviction on the ground that '[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced

by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.' 'It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, the movant must establish, inter alia, that there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[ ] (6) which does not merely impeach or contradict the record evidence' (People v. Smith, 108 AD3d 1075, 1076 [2013], lv. denied 21 NY3d 1077 [2013] [internal quotation marks omitted]; see People v. Salemi, 309 NY 208, 215-216 [1955], cert. denied 350 US 950 [1956]). Defendant has the burden of establishing 'by a preponderance of the evidence every fact essential to support the motion' (CPL §440.30[6])" (Backus, supra at 1623).

Defendant's theory is based upon a witness who defendant did not put on the witness stand at trial. While both

parties consented to Tonya Priest's statement being allowed into evidence, the Court considered Priest's statement and addressed its merit in the Court's April 6, 2015 decision.

Again, Priest's credibility is called into question because she says Steen told her in 2006 that he, Breckenridge and Bohrer abducted Heidi Allen. This information is questionable on many levels. Both Steen and Bohrer testified that they never knew one another, and both Bohrer and Breckenridge stated that they only met each other once.

Despite the fact Priest's statement was considered hearsay by this Court in its previous decision, in all fairness to defendant, the Court considered this statement with respect to the third-party culpability evidence, yet finds that it still lacks any merit.

The crux of Priest's statement is that Steen told her in 2006 that he, Breckenridge and Bohrer took turns beating Ms. Allen to death, "cut up her body" and then hid her under floorboards in a cabin in the woods off Rice Road in Mexico (Exhibit 35). Priest claimed Steen said they burned Ms. Allen's clothes in a wood stove in the same cabin. Steen described the cabin as being deep in the woods, at the edge of a clearing, and a person would have to cross over a set of railroad tracks to get

to said cabin.

With respect to the third-party culpability evidence, this Court, upon consent from both parties, allowed hearsay testimony, which will be discussed later in this decision, from several witnesses about the possibility that James Steen, Roger Breckenridge and Michael Bohrer kidnapped and killed Heidi Allen.

In order to address the admissibility of these statements, the Court has to review them as to whether the individual statements are admissible as hearsay exceptions and then under the more generous third-party culpability standard.

Regardless of the fact that each of the alleged suspects gave testimony as defendant's witnesses and were cross examined, other relatives, friends and acquaintances testified to different purported admissions those three men had made over the decades with respect to Ms. Allen's disappearance. However, despite the plethora of information provided by a multitude of sources who claimed to be close to these three suspects, none of their testimony can be corroborated or deemed credible.

"'While evidence tending to show that another party might have committed the crime would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly

to point out someone besides the prisoner as the guilty party' (see Greenfield v. People, 85 NY 75, 89 [1881]). 'Remote acts, disconnected and outside of the crime itself, cannot be separately proved' to show that someone other than the defendant committed the crime (see id.)" (People v. Schulz, 4 NY3d 521, 529 [2005]).

"'Before permitting evidence that another individual committed the crime for which a defendant is on trial, the court is required to determine if the evidence is relevant and probative of a fact at issue in the case, and further that it is not based upon suspicion or surmise' (People v. Oxley, 64 AD3d 1078, 1081 [2009]; see People v. Primo, 96 NY2d 351, 356-357 [2001]). 'Then, the court must balance the probative value of the evidence against the prejudicial effect to the People and may, in an exercise of its discretion, exclude relevant evidence that will cause undue prejudice, delay the trial, or confuse or mislead the jury' (Oxley, supra at 1081; see Primo, supra at 356-357). Although a trial court has 'broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters' (People v. Hudy, 73 NY2d 40, 56 [1988]; see Holmes v. South Carolina, 547 US 319 [2006]), 'the trial court's discretion in this area is circumscribed by the

defendant's constitutional rights to present a defense and confront his accusers' (Hudy, supra at 57; see Chambers v. Mississippi, 410 US 284 [1973]; People v. Robinson, 89 NY2d 648 [1997]; People v. James, 242 AD2d 389 [1997])" (People v. Thompson, 111 AD3d 56, 64 [2nd Dept. 2013] [internal citations omitted]).

Defendant presented several witnesses who testified to statements made to them after Ms. Allen's disappearance these past twenty years. However, setting aside the hearsay statements for the moment and addressing them under the third-party culpability standard, none of these statements were corroborated by independent evidence.

In examining with specificity Steen's alleged statements to Priest, Chief Investigator Haumann, from the Federal Public Defender's Office, testified at length the extent of the two cabins he located and searched where Priest indicated contained Ms. Allen's remains. Haumann found two cabins: one in June 2014 and one in July 2014. The first cabin was off the western end of Rice Road toward Route 11. The cabin appeared uninhabitable, with some metal and wood on the sides of the structure and some type of flooring. Haumann testified that he tore up the remaining floor boards with a pickax which yielded

negative results. However, Haumann spoke with a neighbor, Mr. Donegan, who confirmed that the cabin had been demolished prior to Ms. Allen's disappearance.

The second cabin was located at the eastern end of Rice Road. This was the same cabin that Jeremy and Nicole Powers went to search for Ms. Allen's remains.

In contrast to Priest's assertions, the cabin was in thick brush in the woods, not near an open field. Further, Haumann testified that the cabin was not near any railroad tracks, it did not contain a wood stove and it did not fit the description of the cabin provided by Priest.

Dog handler Kathryn Bamford and her dog, Hawk, were brought in to search the site of this second cabin. Bamford stated that her dog indicated a spot where human remains could have been. Regardless of the accuracy of the dog's indication for human remains at the second cabin, Haumann's testimony was that this cabin did not fit the description provided by Priest. Therefore, this Court is led to believe that whatever human odor the dog obtained, it did not belong to Ms. Allen's remains.

Joseph Lisi, a forensic investigator employed by Onondaga County Medical Examiner's office, participated in excavation at this second cabin on June 29, 2014. He stated that

he had participated in two other investigations where the cadaver dogs had indicated the presence of human remains but that none were found. In this case, the excavators dug down about twenty nine inches under the footprint of the cabin and reached a hard packed level or layer of clay that was undisturbed across the entire area. Investigator Lisi also described the condition of the cabin as being in a heavily wooded area not near any railroad tracks, contrary to Priest's assertions.

Deputy Chief Medical Examiner Dr. Laura Knight and another doctor from the Onondaga County Medical Examiner's Office came to the second cabin to perform a forensic dig of the area. The footprint of the cabin was divided into four quadrants in which the dirt was sifted, yet no human bones were found. Dr. Knight also testified that she has been assigned to cases in which the cadaver dogs have indicated the presence of human remains, yet no such remains were recovered.

Defendant's third-party culpability evidence presented at the hearing is in stark contrast to the underlying facts in People v. Negron, 26 NY3d 262 [2015]. In Negron, supra, defendant filed a CPL §440.10 motion under the theory that the People had violated their Brady obligations by failing to disclose information about another suspect's arrest and

possession of .45 caliber ammunition close in time to defendant's arrest for the instant crime. Negron contended that the People also misled the court about defendant's third-party culpability defense.

After an early morning road rage incident, Negron was identified as the man who shot another individual in the leg. In addition to the victim, there were four other witnesses to the event. Three of the witness, who initially fled after the incident but returned after police arrived, stated that Negron entered a specific apartment building on the same street where the shooting occurred. One witness described Negron as having facial hair and stated that a 1999 Chevrolet Monte Carlo was driven by the suspect. The police located the Monte Carlo and after realizing it was still warm to the touch, surmised that the vehicle belonged to Negron, who resided in the same apartment building to which the suspect had fled. When Negron spoke with the police that same day, he stated he was the sole operator of it and returned home about two hours prior to the shooting. An ensuing search of his vehicle yielded no evidence of the crime.

With respect to identification evidence, only the victim could identify Negron as the perpetrator. Two of the witnesses identified other individuals in a police arranged

lineup and one witnesses who viewed Negron at a showup, stated Negron was not the man he saw shoot the victim.

At trial, defense counsel sought to introduce evidence that a third-party, Fernando Caban, had committed the shooting as Caban closely matched the description of Negron, lived in the same apartment building and was arrested the following day for weapons possession. The People objected by arguing there was no close resemblance between the two other than their ethnicity and further argued that it was irrelevant that Caban had been arrested the next day for weapons possession as the weapon had not been used in the shooting, despite the fact it had been found on the roof of a building next to the apartment complex. The trial court rejected defendant's argument.[1]

The Court of Appeals reversed the order of the Appellate Division, granted defendant's CPL §440.10 motion and vacated defendant's judgment of conviction. The Court held: "Caban did bear a general resemblance to the description of the perpetrator, lived in the same building and was arrested in close proximity to the time of the offense for possessing weapons and

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[1] It should be noted that the trial court was found to have applied the incorrect standard in assessing the third-party culpability evidence, which was addressed by the Court of Appeals. The Court also held defendant failed to receive meaningful representation.

ammunition (including the type of ammunition used in the shooting) under circumstances evincing a consciousness of guilt. This evidence cannot be classified as '[r]emote' or 'disconnected' from the crime at issue (compare People v. Schulz, 4 NY3d 521, 529 [2005])" (Negron, supra at 268-269).

Further, the Court addressed the People's alleged Brady violation:

> defendant argues that the People failed to turn over Brady evidence that would have been supportive of his third-party culpability defense — in particular, information concerning the circumstances of Caban's arrest and his possession of .45 caliber ammunition. The trial assistant (who was also prosecuting Caban and was quite familiar with the circumstances of his arrest) in addressing defendant's third-party culpability application characterized Caban's arrest as "irrelevant" and his connection with the shooting as "tenuous at best." The prosecutor also attempted to portray defendant's application as a mere attempt to pin the crime on another individual who lived in the same building and happened to be of the same ethnicity, all while aware that defense counsel was not fully familiar with the relevant information surrounding Caban's arrest.
>
> Under Brady, "the prosecution's failure to disclose to the defense evidence in its possession both favorable and material to the defense entitles the defendant to a new trial" (People v. Vilardi, 76 NY2d 67, 73 [1990]). "[W]here a defendant makes a specific request for a document, the materiality element is established provided there exists a reasonable possibility that it would have changed the result of the proceedings" (People v. Garrett, 23 NY3d 878, 891-892 [2014]).

> Here, where the evidence against defendant was far from overwhelming, there is a reasonable possibility that the verdict would have been different if the information about Caban had been disclosed. There was no physical evidence tying defendant to the shooting and only one out of the five eyewitnesses identified defendant as the perpetrator. The evidence of Caban's .45 caliber ammunition was plainly favorable to the defense. In other words, this information "would have added a little more doubt to the jury's view of the" evidence and it is reasonably possible "that a little more doubt would have been enough" (People v. Hunter, 11 NY3d 1, 6 [2008])" (Negron, supra at 269-270 [internal citations omitted]).

With respect to the facts before the Court in the instant case, the evidence presented is too remote and disconnected to show that someone other than defendant kidnapped Heidi Allen. None of the witnesses can credibly place Steen, Breckenridge or Bohrer at the D&W the morning Ms. Allen disappeared. None of the witnesses testified to the fact that Steen, Breckenridge or Bohrer had a van similar to the one seen that morning at the store. None of the witnesses can tie Steen, Breckenridge or Bohrer as being together the morning before or during the morning Ms. Allen was kidnapped. None of the witnesses can prove that Steen, Breckenridge or Bohrer were more than social acquaintances, and even Steen and Bohrer both admit that they did not meet one another.

Steen testified that he knew Breckenridge from school,

used drugs with him, and considered him a social acquaintance. Steen said he never met Bohrer, but knew that his wife had purchased a computer from Bohrer. Breckenridge also stated that he knew Steen from school and did drugs with him, and he only met Bohrer once and did not hang out with him. Bohrer stated that he did not know Steen and that he had met Breckenridge once, through his friend Tom Martin.

Moreover, despite whatever statements can be attributed to Steen, Breckenridge or Bohrer with respect to what happened to Ms. Allen or where her body is located, all three men were questioned by defendant at this hearing and denied any involvement in abducting Ms. Allen from the store.

The Court realizes that there was little chance of Steen, Breckenridge or Bohrer admitting to kidnapping Ms. Allen or being involved in disposing of her after the fact, if they had, in fact, been involved in those acts. Thus, the Court considers the other witnesses' testimony pertaining to Steen's, Breckenridge's or Bohrer's alleged statements, despite the fact the testimony is hearsay, in support of defendant's third-party culpability defense.

However, with respect to several witnesses testifying to statements made by Steen, Breckenridge or Bohrer, none of

those statements can be corroborated. The witnesses testified that Ms. Allen was either "chopped up", burned in a stove or fire pit, buried underneath floor boards in a camp, or that her body was in a van which was salvaged in Canada. There is no proof as to how Steen, Breckenridge or Bohrer were directly related to Ms. Allen's kidnapping other than hearsay evidence of vague statements as to why Ms. Allen was killed and that she was dead. Even those statements are not consistent.

Defendant places a lot of weight on the testimony of Jennifer Wescott and her recorded phone call with Priest. Wescott responded to Priest's statement that Steen, Breckenridge and Bohrer showed up at their house on Rice Road with Ms. Allen in the van:

> Priest: But he [Steen] just told me that him, [Steen],Michael Bohrer and uh Roger had taken uh Mike's van to the store and that they grabbed her from the store and they brought her to your house and um he said that you did flip out when you guys got there and uh you know I stuck up for you and I don't blame you for flipping out uh and basically that's what he had said had happened.
>
> Wescott : Um uh. ...
>
> Priest: Right. Did you even know that ....this was Heidi that they brought there and that this is what they were going to do?
>
> Wescott: Nah, uh
>
> Priest: Had no clue, they just showed up with her?

Wescott: Yeah.

Priest: What a bad position for you - probably scared the shit out of you?

Wescott: Well it's not even - they didn't even bring her in the house, they made her sit in the van. (Defense Exhibit 35)

While Westcott later testified at the hearing that she lied to Priest during the phone call, the Court is still left to resolve the credibility of Wescott's response that the three men showed up with Ms. Allen in a van at the house. It has been established through Steen and Bohrer's testimony that in 1994 Steen and Bohrer did not know one another, thus, how could they have been together in 1994 with Ms. Allen?

Further, even if the Court were to credit Wescott's statement about Ms. Allen being in the van at the house, it does not prove that Ms. Allen was dead at the time and that the three men thereafter killed her at a cabin and either buried her under floor boards or drove her in a van to Canada after she was killed. At best, even if her statement is the truth, defendant has presented no credible evidence other than this statement as to what happened with Ms. Allen and how the three specifically were involved.

Wescott testified that in April of 1994, when she was seventeen, she lived on "County Route 38, Hastings" with her

parents (HT p. 1399 lines 2-4). Specifically, with respect to residing on Rice Road, her testimony on cross examination is as follows:

> Q. Now, Ms. Peebles asked you a question about Rice Road. Did your mom or your dad ever live on Rice Road in the Town of Mexico?
>
> A. No.
>
> Q. Have any of your relatives lived on Rice Road in the Town of Mexico?
>
> A. No.
>
> Q. Have you ever stayed the night or spent the night at a residence on Rice Road in the Town of Mexico?
>
> A. No. (HT p. 1399 lines 5-14)

Wescott also testified that she went along with the conversation Priest wanted to have about the kidnapping to give Priest attention and that she even lied to Priest about being subpoenaed to testify at the Thibodeaus' trial:

> Q. Were you actually subpoenaed to go into court for either of the Thibodeaus?
>
> A. That's a lie. I wasn't.
>
> Q. Why did you say that you were subpoenaed to go to testify for the Thibodeaus?
>
> A. I told Tonya a lot of lies as I said. (HT p. 1412 lines 11-16)

Moreover, Darcy Purdy's testimony contradicts Priest's

claim that Wescott and Breckenridge lived at the home on Rice Road at the time Ms. Allen was kidnapped. Exhibit 84, which is the lease Darcy Purdy executed on December 9, 1992, was introduced into evidence. Based upon that lease, Purdy testified that she continuously lived at that property on Rice Road from January of 1993 through the end of 1995 (HT p. 2141 lines 2-4).

Purdy testified that when she was married in September of 1994, she was still residing at that location and had a rehearsal barbeque there. The copy of the registry book from what was St. Michael's Parish reflected Purdy's Rice Road address when she was married (Exhibit CCCC). Further, mail, specifically a 1995 catalog and a 1995 vacation planner, which Purdy claims she received at the Rice Road address, were entered into evidence (Exhibits EEEE and FFFF, respectively). Finally, Purdy testified to a letter that she mailed to her mother from her Rice Road address which bears a post mark of May 5, 1994 (Exhibit GGGG).

Thus, Purdy's testimony contradicts Priest's claim that Breckenridge and Wescott lived on Rice Road in April of 1994 and it calls into question Wescott's statement to Priest that Ms. Allen was brought to her residence in a van in 1994.

Defendant called Deb Vecchio and Brian Mensch to prove that around April of 1994 Wescott and Breckenridge were either

living at the trailer on Rice Road or visited Wescott's mother there. However, Vecchio repeatedly guessed at the time frames in which Purdy and Wescott lived at the residence on Rice Road and provided no documentation to support her testimony. Mensch stated that he lived in the garage behind the trailer for about a month and that, to his knowledge, no one was living in the trailer in either 1993 or 1994 when he believed he lived there. Mensch also previously told law enforcement he lived in the garage in either 1994 or 1995.

Then, Priest's statement about the camp's location vacillated: the camp was in an open field, the camp was in the middle of the woods, the camp was near railroad tracks. When searchers, those both lay and professional, searched the two camps for human remains, no human bones or remains were found. There was testimony pertaining to cadaver dogs having a positive hit on a location, only to find that no human remains were recovered.

The Court is hard pressed to see how any of the claimed newly discovered evidence presented at the hearing, if allowed at trial, would likely result in a different outcome. While these three men were in Oswego County in 1994, Steen and Bohrer had never met, and other than occasional drug use, Steen and

Breckenridge were not friends. Without more specificity, there was no credible, trustworthy, or reliable evidence presented at the hearing by defendant, which links any of these three men to this crime.

These three men engaged in conjure and speculation which has resulted in them being suspects in the instant hearing. Yet, despite all the statements attributed to these three men over the course of the hearing, there has been no credible or corroborative evidence supporting there is any truth to any of their statements.

Even Steen's statement that he was told that he brought the van which contained Ms. Allen's body to Canada to be scrapped is uncorroborated by Murtaugh who testified that her body was not in the van hauled by Steen. If the Court were to surmise Steen's statement as being truthful, however, there is no intentional act Steen committed that is in violation of the law. Had he, in fact, driven the van and disposed of her body which was contained within the van, Steen learned of that fact after it had been salvaged. There was no credible proof at the hearing that he intentionally drove the van which arguably contained Ms. Allen's body to Canada to be destroyed.

Identification by William Pierce

Defendant accords a great deal of weight on William

Pierce's twenty year old identification of James Steen as the man he saw the morning outside of the D&W arguing with Ms. Allen. However, after a thorough and thoughtful review of Pierce's testimony, there are several significant details which should be addressed that underscore the unreliability of his identification of Steen some twenty years from the actual event.

First, Pierce states that, while he was stopped in his vehicle at the intersection of 104 and 104B he saw a domestic dispute in the parking lot of the D&W the morning Ms. Allen was abducted. Pierce stated that, while looking across the street from his vehicle, he saw a man sitting in the driver's seat of a white rusty van arguing with a woman who was standing outside of the van. After the male driver got out of the van, the driver came around to the front of the van and "come up behind the girl, or the woman, and he hit her behind the right ear on the base of her neck, her base of her skull, with his fist, and she folded his -- just like a rag doll" and Pierce saw this man and a passenger open the passenger side door before Pierce continued into traffic (HT p. 974 lines 17-20).

Pierce stated that in his "own mind that [he] had seen a domestic dispute, and you don't get -- at that time you didn't get between a domestic -- in two combatants" (HT p. 979 lines 19-

21). What Pierce had described can hardly be considered a domestic dispute, but regardless, he chose to drive away and never report what he witnessed that morning to law enforcement, let alone call authorities for the sake of the woman who he just saw assaulted.

Second, Pierce testified that there was three to six inches of slush on the road that morning (HT p. 979 line 23), yet the pictures from the D&W only show a partially wet road, not one that was covered in inches of slush (Exhibits UU and ZZ). Pierce also stated that he had his sunglasses on because it was sunny, yet the pictures do not reflect that morning being sunny.

Third, Pierce believed law enforcement captured the suspect, that being defendant, when he saw a picture of defendant and drew a beard on him and thought it was the man he saw the morning at the D&W (HT p. 1008). Then, in June of 2014, solely out of good will in wanting to reassure the Sheriff that he did, indeed, arrest the correct suspect, Pierce went to talk to the Sheriff.

On July 25, 2014, Pierce spoke and met with Inv. Pietroski and told the investigator that defendant was the same man he saw on Easter morning at the D&W twenty years ago. However, when Pierce met with Inv. Pietroski on October 28, 2014,

Pierce was not able to identify either defendant or Steen in the photo arrays (Exhibit EEE, Exhibit DDD, respectively).

Fourth, Pierce testified that he changed his mind about defendant being the man he observed on Easter morning when he saw Steen's picture (Exhibit 138) "in the Post-Standard about ten days to two weeks after" he had made that initial statement in July of 2014 to Detective Pietroski (HT p. 1031 lines 12-14).

Pierce stated that from where his vehicle was positioned at the intersection to where he saw the van at the D&W, he was approximately sixty feet away (HT p. 1016 lines 2-9).

The Court is well aware of the significant and multitude of research which has been published in the recent years about the credibility of eyewitness identifications.

> Over the past few decades, criminal defendants have increasingly called on psychologists to offer expert opinion testimony regarding the objective and subjective factors that influence the reliability of eyewitness identifications. They argue that misidentifications may lead to false convictions and that in certain cases, experts may offer the jury much needed guidance regarding how to assess the reliability of an identification. Typically, such expert testimony is based on research findings from experiments that test how accurately experiment subjects (i.e., "witnesses") recall faces and other details under various conditions. According to one commentator, the overall research findings show that "witnesses often make mistakes, that they tend to make more mistakes in cross-racial identifications as well as when the events involve violence, that errors are easily introduced by misleading questions asked shortly after the witness has viewed the

> simulated happening, and that the professed confidence of the subjects in their identifications bears no consistent relation to the accuracy of these recognitions" (1 McCormick, Evidence §206, at 880 [6th ed. 2006]).
>
> Although there may be risks associated with allowing an expert to apply research findings from experiments on the reliability of eyewitness identifications to real-life identifications, these findings - produced through sound, generally accepted experimentation techniques and theories, published in scholarly journals and subjected to peer review - have over the years gained acceptance within the scientific community. On this point, then Judge Kaye previously stated that "[t]o the extent that judicial acceptance is indicative of general scientific acceptance, the emerging trend today is to find expert psychological testimony on eyewitness identification sufficiently reliable to be admitted, and the vast majority of academic commentators have urged its acceptance .... [P]sychological research data is by now abundant, and the findings based upon it concerning cognitive factors that may affect identification are quite uniform and well documented" (People v. Mooney, 76 NY2d 827, 829-830 [1990, Kaye, J., dissenting] [internal citations omitted]) (People v. LeGrand, 8 NY3d 449, 454-55 [2007]).

To understand more about the research of misidentifications by eyewitnesses, it is important to understand how a perceived event can be altered in a witness' memory.

"Like vision, memory is also beset by noise. Encoding, storage and remembering are not passive, static processes that record, retain, and divulge their contents in an informational vacuum, unaffected by outside influences. The contents cannot be

treated as a veridical permanent record, like photographs stored in a safe. On the contrary, the fidelity of our memories for real events may be compromised by many factors at all stages of processing, from encoding through storage, to the final stages of retrieval. Without awareness, we regularly encode events in a biased manner and subsequently forget, reconstruct, update, and distort the things we believe to be true" (National Research Council of the National Academies, "Identifying the Culprit" 59-60 [2014]).

In this case, Pierce's memory of the man he saw the morning at the D&W was examined. On direct examination, Pierce stated the following with respect to why he did not recognize Steen in the photo array shown to him by Inv. Pietroski:

> Q. Now, were you able to identify Mr. Steen in that photo array?
>
> A. No.
>
> Q. And why not?
>
> A. Well, for one thing I've never -- I never -- I didn't -- I don't know the man, I never saw him in my life before except for this one picture that's embedded in my mind, and I wouldn't recognize him if he walked past me right here. (HT p. 977 lines 15-23)

During cross examination, the following testimony took place between Pierce and District Attorney Oakes in relation to

Pierce viewing photographs of Steen:

Q. Mr. Pierce, on July twenty-fifth of 2014, you met with Investigator Pietroski of the Oswego County Sheriff's Department didn't you?

A. I do believe it was this year.

Q. Okay, within this past year?

A. Yes.

Q. Okay. And did you meet with him at the Oswego County Sheriff's Department?

A. Yes, I did.

Q. And you gave a statement to Investigator Pietroski that day.

A. Yes, I did.

Q. And he eventually typed up what it was you told him?

A. Yes, he did.

Q. And did he print that off and give you a chance to read it, sir?

A. Yes, he did. ...

Q. Okay, Mr. Pierce, I'm going to direct your attention to a particular segment.

A. Okay.

Q. Where it says, "I did get a good look." What I'm going to do is I'm going to read it and ask you to follow along as I read it, okay?

A. Okay. ...

Q. Mr. Pierce, looking at the statement, did you

tell Investigator Pietroski, "I did get a good look at the driver that hit the woman and later saw on the news the police had Gary Thibodeau under arrest and I said that's the guy that hit the woman at the convenience store at 104 and 104B Easter morning."

A. Um hum.

Q. Is that what you told Investigator Pietroski?

A. Yes, I did.

Q. And again, would you agree with me that in your statement you're basically saying you were pretty certain that it was Gary Thibodeau when you saw it on the news?

A. Yes, I was. ...

Q. Mr. Pierce, during 1994 and 1995, weren't there repeated requests in the news or in the media that if anybody had information relative to this case please come forward?

A. Only after I had gone and made this statement to Pietroski, Detective Pietroski, did I see anything in the paper about it. The time over the years there was plea for anybody that knew anything to come forward at that time.

Q. Well, in 1994 specifically, weren't there requests in the media that law enforcement was asking anybody with information about that morning to come forward?

A. Um hum.

Q. But you never came forward at that time?

A. Well, I figured there was so many people that saw the incident that one of them should have gone forward too, and if they'd have stepped forward, I'd have stepped forward. At the time, I didn't

want to get involved. (HT pp. 1005-1012)

Then, Pierce met with Inv. Pietroski in October of 2014 to view two photo arrays which separately contained photographs of defendant and Steen.

> Q. And when you were shown that photo array [Exhibit DDD], you didn't recognize anybody in that photo.
>
> A. I don't know any of them. How should I recognize them?
>
> Q. Okay. Well, you didn't recognize any of those people as being the male in the van did you?
>
> A. Not at all.
>
> Q. Okay. Now do you realize that Mr. Steen is in position number three in that photo array?
>
> A. I wouldn't say that was Mr. Steen that I know. That's the Steen that I know (indicating).
>
> Q. Number -- Exhibit 138 is the Steen that you know.
>
> A. Um hum. That's the one that I know. Those are two different people as far as I can see. (HT p. 1035 lines 4-17)

In this case, Pierce's inability to accurately identify the man he claims he saw the morning at the D&W can be based on many factors. Leaving aside for the moment Pierce's failure to report what he observed immediately after the incident, or even within those weeks or months that followed before defendant's

trial, the Court will address the problems with witness identifications which are susceptible to a plethora of taint.

"A witness' inevitable interactions with law enforcement and legal counsel, not to mention communications from journalists, family, and friends, have the potential to significantly modify the witness' memory of faces encountered and of other event details at the scene of the crime. Thus the fidelity of retrieved events - and the accuracy of identification - is likely to be greater when retrieval occurs closer to the time of the witnessed events. The conclusion above has important implications for law enforcement and the legal process and calls into question the validity of in-court identifications and their appropriateness as statements of fact" (National Research Council of the National Academies, supra at 65).

Given the fact that it is unclear how many times Pierce viewed both defendant's and Steen's photographs in the media over the past twenty years, and the obvious fact that Pierce is claiming that he can now, without any shadow of a doubt, say that Steen is the one he saw the morning at the D&W with Ms. Allen, is not credible. While Pierce may be trying to accurately recount from his twenty year old memory what he witnessed that morning, outside influences and the frailty of encoding, storage and

remembering must be taken into account.

Further, the Court has to reconcile the fact that Pierce did not identify either defendant or Steen in the photo arrays when he viewed them with Inv. Pietroski. It isn't until Pierce sees Steen's unrelated booking photo in the newspaper some two weeks after meeting with Inv. Pietroski that Pierce claims that Steen is the real suspect. However, Pierce cannot even identify Steen in the initial photo array shown to him by law enforcement and claims he does not know Steen.

The Court understands that the newspaper's picture of Steen, which shows Steen with a beard, helped Pierce to finally recognize Steen these twenty years later. However, for this Court to wholeheartedly invest any credence in Pierce's twenty year old conditional identification of Steen as Ms. Allen's kidnapper, the Court has to ignore common sense and discredit previous judicial reliance upon vast scientific research; both of which discredit Pierce's testimony.

If anything can be gained from Pierce's testimony, it is that even Pierce cannot identify defendant nor Steen from their photographs taken closer in time to Ms. Allen's disappearance (Exhibits EEE and DDD). The Court understands that as Pierce testified, he believed he saw a bearded husky, possibly

migrant worker of Hispanic origin, argue with Ms. Allen that morning. However, due to the fact that he failed to immediately report and document what he observed, his failure to identify Steen in the first photo array in 2014, and Pierce's unwavering belief that, after defendant was arrested in 1994 and during the initial interview with Inv. Pietroski in 2014, that defendant was the man he saw the morning with Ms. Allen in 1994, the Court cannot yield any evidentiary value to his testimony that Steen's more recent picture enables him to identify Steen as the suspect from twenty years ago.

Statements Against Penal Interest

Throughout the hearing, the Court heard from many of defendant's witnesses about statements that Steen, Breckenridge and Bohrer made over the years pertaining to Ms. Allen's kidnapping. Defendant argues that these various statements import the men's culpability, which is evidence defendant could use in his defense at a new trial.

Defendant argues that the statements made by Steen Breckenridge and Bohrer to other individuals are admissible as statements against their penal interest.

The hearsay exception of a statement made against one's penal interest:

has been recognized out of necessity and in the belief that the self-inculpating nature of the declaration serves as an adequate substitute for the assurance of reliability usually derived from the administration of an oath and the testing of the statements by cross-examination. Because these traditional guarantees are absent when out-of-court declarations against penal interest are offered, such evidence is admitted cautiously and only after reliability is firmly established (People v. Thomas, 68 NY2d 194, 198; People v. Geoghegan, 51 NY2d 45, 49; see generally, Fisch, NY Evidence §891 [2d 1977]). As with all forms of hearsay evidence, a determination of the admissibility of a declaration against penal interest, focusing on the circumstantial probability of its reliability, must be made before it is received; the trial court must determine, by evaluating competent evidence independent of the declaration itself, whether the declaration was spoken under circumstances which renders it highly probable that it is truthful (see, People v. Shortridge, 65 NY2d 309, 312-313; see generally, Richardson, Evidence §206, at 183-184 [Prince 10th ed. 1973]; Goodman & Waltuch, Declarations Against Penal Interest: The Majority Has Emerged, 28 NYLSchLRev 51 [1983]; Fine, Declarations Against Penal Interest in New York: Carte Blanche?, 21 Syracuse L Rev 1095 [1970]). Thus, before statements of a nontestifying third party are admissible as a declaration against penal interest, the proponent must satisfy the court that four prerequisites are met: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction, or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time of its making that the statement was contrary to his penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability (Thomas, supra at 197) (People v. Brensic, 70 NY2d 9, 14-15 [1987]

[internal citations omitted]).

Defendant called many witnesses to the stand throughout the hearing to testify to certain statements made since Ms. Allen's kidnapping by Steen, Breckenridge and Bohrer.

Putting aside the fact that the first prong of the statement against penal interest hearsay exception, that the declarant is unavailable to testify[2], was not met in this case, the witnesses who testified to certain statements made to them by Steen, Breckenridge and Bohrer fail to meet the exception under the other three prongs.

As discussed previously, Priest's statements made about the substance of Steen's admission is wholly unreliable. Not only did defendant not call Priest as a witness in this case, but rather chose to admit her written statement, corroboration of the alleged admission that Ms. Allen was buried somewhere out on Rice Road under the floor of a cabin was proven false.

Joseph Mannino testified that while he was incarcerated with Steen in the Oswego County Jail in 2011, Steen told him Ms. Allen was a "rat" and that Steen had hauled the van which

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[2] Compare with People v. Soto, 26 NY3d 455 [2015], wherein the witness was unavailable to testify because she had invoked her Fifth Amendment right to remain silent and the People refused to grant her immunity.

contained her body to Canada to be salvaged (HT pp. 641-642). However, Mannino testified that Steen did not implicate himself in the direct kidnapping of Ms. Allen, and acknowledged on cross examination that Steen's statements could have been mere conjecture. As the Court questions Mannino's inconsistent hearing testimony to that of his July 28, 2014 sworn statement, and the fact there was no basis to corroborate the underlying facts in the statements made by Steen to Mannino, Mannino's testimony would not be allowed at trial.

Amanda Braley testified that while she was at a party in 2006 or 2007 she heard Steen tell another person "You know me, Shaggy, I'm not afraid to go to prison, I'll go for anybody" and "I can, however, tell you I will never see a day in prison for what we did to Heidi" (HT p. 673). However, despite Braley's hearing testimony, she did not recite these same statements when she provided her sworn statement to defendant's counsel (Exhibit K and HT pp. 689-693). Further, Braley admitted that while she believed Breckenridge was also involved in Ms. Allen's disappearance, she continued to socialize with him and Wescott. She also said she went with Wescott to look for Ms. Allen's remains in a cabin in 2006, all while believing Breckenridge's statement that Ms. Allen's body was disposed of in a van which

was driven to Canada.

Braley also testified that Breckenridge stated in front of her and six or seven others in 2002 or 2003 at a party that "he took that bitch to the scrap yard in the van, they had it crushed, and that she was shipped to Canada" (HT pp. 669-670). However, on cross examination, the following exchange took place:

> Q. Okay, and you testified to certain statements that you heard Roger Breckenridge make, one of those being, "We took that bitch to the scrap yard in the van?"
>
> A. Yes.
>
> Q. He didn't specify who we?
>
> A. No.
>
> Q. We was?
>
> A. No.
>
> Q. Did he say how she came to be in the van?
>
> A. No.
>
> Q. He didn't say that he had abducted or kidnapped her from the store did he?
>
> A. No.
>
> Q. He didn't say anything about killing her did he?
>
> A. No, not in my presence.
>
> Q. He didn't say anything about dismembering her or chopping up her body or anything like that?

A. Not to me.

Q. He didn't say anything about burning the body?

A. No.

Q. At any point? He didn't really -- and he didn't specify whether he had contact with her while she was even alive did he?

A. No.

Q. Did he say where the van came from?

A. Nope. ...

Q. Okay, and at that time you said when he made a comment, Jen responded essentially saying Roger, you can't be saying that stuff or that shit?

A. Yeah.

Q. Okay, and Roger's response was, "That shit is done and over with?"

A. Yes.

Q. Okay, did you get the impression when he said that that he wasn't concerned about being charged with it?

A. Yes. ...

Q. You thought he was talking about a real incident?

A. Yes.

Q. Based on hearing those words, you thought he might have actually disposed of Heidi Allen's body?

A. Yes.

Q. Okay, so since that -- well, that night then, you reported it to police, right?

A. No.

Q. The next day?

A. No.

Q. The following month?

A. No.

Q. Never?

A. Nope.

Q. Okay, so after that day, you never had any other contact with Mr. Breckenridge, right?

A. No, I did.

Q. You did?

A. Yeah.

Q. This man you thought sincerely and honestly disposed of Heidi's body, you kept hanging around him?

A. I really didn't have a choice in the matter.

Q. You weren't living there at that point, right?

A. Right. (HT pp. 676-681)

Based upon Braley's cumulative testimony together with her sworn statement, the Court finds that Braley's testimony regarding Steen and Breckenridge's statements is not trustworthy or reliable.

Ronald Clarke testified for the defense that Steen stated to him and his children a few years after defendant's trial that Ms. Allen was "long gone now", "gone to Canada" and that the police had arrested the wrong people and that the "Thibodeau boys didn't do it" (HT p. 1051). Steen also told Clarke that he knew more about Ms. Allen's case than the police. This discussion took place when Steen "just happened to pop in the door the same time I was like kind of discussing with my boys to let them go for the bicycle ride, and he looked right at my boys, and they were from me to you away, and he said, 'Oh, boys,' he says, 'It's getting late and you better listen to your dad.' He says, 'Look at what happened to Heidi Allen'" (HT pp. 1049-1050).

However, again, even assuming Steen had not testified at the hearing, there is nothing to support the argument that Steen's statements to Clarke were more than mere speculation, and were not based on any direct knowledge Steen had of Ms. Allen's kidnapping.

Megan Shaw testified that Steen told her in May of 2010, and then again referenced their conversation in June of 2010, that he disposed of Ms. Allen and knew that Ms. Allen's remains were strewn about in and around a cabin in Parish, New

York. Shaw claimed Steen helped dispose of Ms. Allen to curry favor with the Vicious Circle motorcycle club. However, if the Court were to consider admitting Shaw's testimony at trial, again, there is no corroboration to the fact that Steen was involved in the underlying kidnapping. At best, Steen is guilty as an accomplice after the fact in disposing of Ms. Allen's body.[3]

Moreover, the Court credits the testimony of retired Deputy Superintendent Lance Mason, who stated that he founded the Vicious Circle Motorcycle Club around 2000, and that the Oswego County chapter was not formed until 2003 or 2004. Mason also testified that he did not know Steen, Breckenridge or Bohrer and did not know those three to be associated with the Motorcycle Club. Thus, based upon the credibility of Mason's testimony, Shaw's testimony has been proven not to be reliable or trustworthy and it would not be admitted as a hearsay exception.

Christopher Combes testified that he worked with Breckenridge and that some time in the early 2000s, Breckenridge told Combes "We chopped her up, we put her in a wood stove and put her in a vehicle and sent her to Canada", however, Combes

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[3] The Court should note that even if there was proof of the fact, the statute of limitations to prosecute Steen for this act has run (See, generally CPL §30.30).

never told the police about this comment until the Summer of 2014 (HT pp. 1129-1131). Combes also testified that he didn't want to get involved because he "didn't take Roger's words" "credibly" (HT pp. 1131-1132).

In light of the fact that Combes did not believe Breckenridge to be speaking truthfully, and only mentioned Breckenridge's comment to a friend of his who was in law enforcement the summer of 2014 while the Allen investigation became active once more, the Court does not credit Breckenridge's statement to have been made knowingly to inculpate himself.

Jessica Howard also testified about the statements Breckenridge made to her about Ms. Allen being a "rat" and that Ms. Allen wouldn't be found. The Court has great concern over Howard's testimony because it was learned through her testimony that Howard becomes confused and cannot remember facts because of the side-effects of certain medications she ingests. She also testified that the medications were impacting her "ability to remember what was said many years ago" and that she was not sure of her testimony (HT p. 1171 line 3).

Further, defendant tried to admit a picture Howard took with her cellular phone of a photograph which was posted on a community Facebook site. This photograph portrayed two men and

one woman who Howard believed were Ms. Allen, Steen and Breckenridge. However, defendant did not ultimately seek to have this picture admitted once defendant learned that the female in the picture was not, in fact, Ms. Allen.

Given the qualified testimony by Howard due to the effects of her medications on her ability to recall certain events, the Court deems her testimony unreliable and not trustworthy.

Tyler Hayes testified that in 2000 he had a conversation with Bohrer in a local tavern. Hayes approached Bohrer after some patrons complained that Bohrer's conversation about Ms. Allen was making them uncomfortable. Hayes attempted to make Bohrer want to leave the bar but ended up engaging in a conversation with him. Bohrer told Hayes that Bohrer knew who "did it" and knew where Ms. Allen's body was located (HT p. 200). After Hayes' attempt to have Bohrer leave the bar was foiled, Hayes spoke with Bohrer again in the men's room. At that time, Bohrer began "sobbing" and stated that he couldn't deal with it anymore and Hayes told him to call the police. When he got home from the tavern, Hayes called law enforcement and provided a statement to them over the phone about his conversation with Bohrer.

In comparing Bohrer's demeanor at the tavern to Bohrer's demeanor during the hearing, it is obvious Bohrer was deeply, albeit oddly, emotionally attached to Ms. Allen's kidnapping investigation. During Bohrer's testimony, the Court had to take a recess in order for Bohrer to compose himself and stop crying. The Court was able to judge Bohrer's testimony first hand and, despite whatever emotional connection he has to the investigation into Ms. Allen's disappearance, the evidence does not prove that when Bohrer made these statements to Hayes that Bohrer was actually admitting to kidnapping Ms. Allen. Thus, Hayes' testimony would not be admitted as it is not evidence of Bohrer having confessed to the kidnapping of Ms. Allen.

Lastly, Danielle Babcock testified that when she worked with Bohrer in 2001 and 2002, he would make comments that would make her feel uncomfortable:

> Q. Did he ever say anything to you that made you feel uncomfortable?
>
> A. Yes.
>
> Q. What did he say to you?
>
> A. He would tell us several times that he would do us like he did Heidi. (HT p. 632 line 20-25)

However, Babcock admitted that Bohrer made these

statements in front of two other employees, her sister Tanya Babcock and Alex McNab, while they worked with Bohrer at Medspars. Specifically, with respect to how she felt about these threats, Danielle Babcock testified that she did not feel that she was in danger and never contacted law enforcement:

> Q. You never reported this to the police though?
>
> A. No, we just thought it was vague threats. (HT p. 635 lines 9-10)

Given the nature of Babcock's testimony that she viewed Bohrer's statements to her and her sister and coworker as a vague threat, this testimony is not competent evidence which would warrant its admission at trial.

In sum, none of the statements attributed to Steen, Breckenridge and Bohrer, which defendant seeks to introduce as newly discovered evidence, are admissible under the statement against penal interest hearsay exception. "Implicit in th[e] ground for vacating a judgment of conviction is that the newly discovered evidence be admissible" (People v. Tankleff, 49 AD3d 160, 182 [2nd Dept. 2007]). Therefore, defendant's request that his conviction be vacated based upon such newly discovered evidence is **DENIED.**

Review of Diaries

This Court conducted an in camera review of Ms. Allen's 1993 and 1994 diaries at defendant's request[4]. This request was based upon the belief that some of the names written on a piece of paper which was found with the index card in the D&W parking lot could have been contained within her diaries and were Brady material. None of the names written on the piece of paper are mentioned in the diaries.

The foregoing constitutes the opinion, decision and order of the Court.

ENTER.

DANIEL R. KING,
ACTING OSWEGO COUNTY COURT JUSTICE

Dated: March 2, 2016

[4] It should be noted that Judge Clary first addressed defendant's request to have the Court review the diaries in the Court's January 6, 1997 decision. Judge Clary ruled that the diaries were not Brady material. Further in the Appellate Division's decision in Thibodeau, supra, 267 AD2d 952, 954, the Court held that defendant "failed to establish a Brady violation with respect to the withholding of the victim's diaries".